Nos. 18-893, 18-1189

In The Supreme Court of the United States

WEST VIRGINIA HOUSE OF DELEGATES,
Petitioner,

v.

STATE OF WEST VIRGINIA ex rel. MARGARET L. WORKMAN, MITCH CARMICHAEL, President of the West Virginia Senate; DONNA J. BOLEY, President Pro Tempore of the West Virginia Senate; RYAN FERNS, Majority Leader of the West Virginia Senate; LEE CASSIS, Clerk of the West Virginia Senate; and the WEST VIRGINIA SENATE,
Respondents.

MITCH CARMICHAEL, President of the West Virginia Senate, DONNA J. BOLEY, President Pro Tempore of the West Virginia Senate, TOM TAKUBO, West Virginia Senate Majority Leader, LEE CASSIS, Clerk of the West Virginia Senate, and the WEST VIRGINIA SENATE,
Petitioners,

v.

West Virginia ex rel. MARGARET L. WORKMAN,
Respondent.

On Petitions For Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should consider the justiciability of Guarantee Clause claims where the Supreme Court of Appeals of West Virginia did not rule on the justiciability of those claims.

2. Whether a state constitution violates the Guarantee Clause when it empowers a state's judiciary to conduct limited review of a state legislature's impeachment proceedings.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATEMENT OF THE CASE

i. Introduction

This Court's precedent is clear: The Guarantee Clause does not require states to apportion power amongst their governmental branches in any particular way. *See, e.g.*, *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."). Despite this settled principle, Petitioners ask this Court to consider whether the Guarantee Clause mandates a specific balance of power between the legislative and judicial branches of state governments. Specifically, they ask this Court to consider whether the Guarantee Clause bars state courts from reviewing impeachment efforts to determine whether those efforts comport with a state's constitution.[1] That question, however, does not warrant review. As this Court recognized in *Baker v. Carr*, 369 U.S. 186, 226–27 (1962), reliance on the Guarantee Clause is "futile" when the case "involve[s] the allocation of political power within a State." This Court has already decided that the Guarantee Clause does not create a federal template of government with which the states must comply, and neither Petitioner presents a compelling reason to revisit that principle.

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[1] They also ask this Court to broadly consider the justiciability of Guarantee Clause claims; however, as discussed further *infra* pgs. 15–18, that issue was not squarely resolved by the Supreme Court of Appeals.

Although the decision below was rendered in the extraordinary circumstance of an impeachment proceeding, it was a normal exercise of the West Virginia judicial branch's power. State courts are tasked, after all, with interpreting their respective state's constitution. Despite this, Petitioners distort the decision below as a constitutional crisis and assert that it sets the judicial branch up as its own judge. Instead, in a narrow holding, the Supreme Court of Appeals of West Virginia ("Supreme Court of Appeals") determined that the West Virginia Constitution's Impeachment Clause empowers it to review impeachment efforts that violate other provisions of the West Virginia Constitution. The decision below was "not about whether or not a Justice of the Supreme Court of Appeals can or should be impeached; but rather it [was] about the fact that to do so, it must be done correctly and constitutionally with due process." Sen. App. 8. The quintessentially state law decision only briefly mentions the Guarantee Clause, summarily rejecting the Senate's invocation of that Clause because the Senate failed to proffer meaningful authority to support its Guarantee Clause arguments below. This limited holding does not warrant review, especially where Petitioners cannot establish that it implicates any significant confusion regarding the Guarantee Clause.

ii. Statement of Facts

In early 2018, in response to news reports by local media, the West Virginia Legislative Auditor began investigating the spending practices of the Supreme

Court of Appeals. Sen. App. 10. The Auditor issued two reports in April of 2018. *Id.* One of these reports concerned the Respondent, then-Chief Justice Margaret L. Workman, as well as Justice Elizabeth Walker and then-Justice Robin Davis. *Id.* In this report, the Auditor expressed no ethical concerns with the conduct of Respondent. *Id*. The other report focused on the conduct of then-Justices Allen Loughry and Menis Ketchum, and identified concerns with the conduct of those justices. *Id*.

On June 25, 2018, Governor James Justice called the West Virginia Legislature into Special Session to consider the impeachment of one or more of the justices of the Supreme Court of Appeals. *Id*. On June 26, 2018, the West Virginia House of Delegates convened and adopted House Resolution 201, setting forth the rules and procedures for the impeachment proceeding.[2] Sen. App. 11. The House Judiciary Committee conducted impeachment hearings between July 12, 2018, and August 6, 2018. On August 7, the Judiciary Committee adopted fourteen Articles of Impeachment and sent them to the House of Delegates. Sen. App. 12. On August 13, 2018, the House voted to adopt eleven of the Articles individually. Although each of the four remaining justices of the Supreme Court of Appeals were named in at least one Article, the House of

[2] The rules set forth in House Resolution 201 required the House Judiciary Committee to report findings of fact and make recommendations based on those findings. If the Committee recommended impeachment, it was required to present a proposed resolution of impeachment and proposed articles of impeachment to the House of Delegates for their consideration.

Delegates never adopted any resolution stating that any justice should be impeached or made the findings of fact House Resolution 201 required. House App. 125a. Despite these deficiencies, the Articles of Impeachment were presented to the Senate on August 13, 2018. Sen. App. 12.

Three of the Articles named Respondent. Articles IV and VI both alleged that Respondent overpaid senior-status judges in violation of (1) a statute that purported to control the Court's appointment of senior status judges by limiting the number of days they could be appointed and (2) the Canons of Judicial Conduct. House App. 185a–187a. Article XIV alleged a variety of conduct which the House of Delegates asserted violated the Canons of Judicial Conduct, but did not provide any specific allegations concerning the acts or omissions with which Respondent was being charged. Sen. App. 105–106; 107–108; 112–113. None of the articles naming Respondent alleged that any of the conduct "amounted to maladministration, corruption, incompetency, gross immorality, neglect of duty, or any high crime or misdemeanor, as required by Article IV, § 9 of the Constitution of West Virginia." Sen. App. 89.

On September 21, 2018, Respondent filed a Petition for a Writ of Mandamus with the Supreme Court of Appeals, arguing that the Articles of Impeachment violated the West Virginia Constitution's separation of powers doctrine and Due Process Clause. Respondent's Petition named the West Virginia Senate and individual officers within that legislative body (collectively, "the Senate"), and it sought an order halting the

impeachment proceedings because they violated the West Virginia Constitution.

That same day, Respondent recused herself from consideration of the Petition and issued an administrative order appointing Thomas McHugh, a former justice of the Supreme Court of Appeals, as Acting Chief Justice. Sen. Pet. 9. Justice McHugh issued an administrative order appointing Judge James Matish as the Acting Chief Justice. In turn, Acting Chief Justice Matish named Judges Rudolph J. Murensky, II; Ronald E. Wilson;[3] Louis H. Bloom; and Jacob E. Reger to serve as Acting Justices in the consideration of Respondent's Petition below. Sen. App. 2. None of the parties to the Petition objected to Justice McHugh's appointment or to his Order appointing Justice Matish.

On October 3, 2018, the Senate filed a response to Respondent's Petition. In its response, the Senate waived oral argument by insisting that it was "unnecessary." Sen. App. 6. The Senate also declined to address the substance of the arguments in Respondent's Petition, Sen. App. 6, instead choosing to "reference[] in general as to why certain claims by [Respondent] are not valid." Sen. App. 42 n.23. While the Petition was pending, the Senate, acting as the court of impeachment, refused to stay the Respondent's impeachment

[3] The Senate briefly argues that Judge Wilson's decision not to recuse himself violates the Fourteenth Amendment. *See* Sen. Pet. 38. That Due Process argument, however, was only raised *after* the Supreme Court of Appeals issued its opinion and mandate. *See* Sen. App. 141–142 (presenting federal Due Process argument for the first time in a Petition for Rehearing).

trial, which was set for October 15, 2018, and opposed Respondent's efforts to stay the impeachment trial.

On October 11, 2018, the specially convened panel of the Supreme Court of Appeals issued its opinion halting the legislature's impeachment proceedings. In that opinion, it determined that the West Virginia Constitution's Impeachment Clause afforded broader protections than the Impeachment Clause contained in the United States Constitution. Based on that broader Impeachment Clause, it stopped the impeachment proceedings because they ran afoul of several provisions in the West Virginia Constitution.[4] *See infra* pgs. 25–30. The Supreme Court of Appeals issued its mandate contemporaneously with the opinion to halt the impending impeachment trial, which the Senate declined to stay pending resolution of the Petition.

The West Virginia House of Delegates ("House of Delegates") did not seek to intervene while the case below was pending. Instead, the House of Delegates filed a Motion to Intervene with the Supreme Court of Appeals on October 25, 2018, two weeks after the opinion and mandate were issued. House App. 231a. On

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[4] The Senate's Petition for a Writ of Certiorari mischaracterizes the ruling by arguing that "the court then declared a broad category of misconduct completely untouchable by the impeachment process in *any* case—that is, conduct the judiciary also enforces through the Code of Judicial Conduct." Sen. Pet. 36 (emphasis in original). In fact, the Supreme Court of Appeals was careful not to usurp the legislative branch's role in determining what did—or did not—constitute "maladministration, corruption, incompetency, gross morality, neglect of duty, or any high crime or misdemeanor." W. VA. CONST., art. IV, § 9.

November 5, 2018, the Senate filed a Petition for Rehearing in which it attempted to make arguments it previously opted not to make and raised issues it failed to raise in its initial opposition. Sen. App. 116–144. Under the West Virginia Rules of Appellate Procedure, issuance of the mandate terminates the jurisdiction of the Supreme Court of Appeals unless it provides by order that a petition for rehearing may be filed after the mandate is issued. W. VA. R. APP. P. 26(a).[5] Thus, the Supreme Court of Appeals refused to consider the Senate's Petition for Rehearing and the House of Delegates' Motion to Intervene. Sen. App. 102; House App. 95a. The Petitions for a Writ of Certiorari by the Senate and the House of Delegates followed.

REASONS FOR DENYING THE PETITIONS

This Court should deny the Petitions for Writ of Certiorari for four primary reasons. First, the decision below rested on independent and adequate state law grounds. Although the Petitioners focus on the Supreme Court of Appeals' discussion of the Guarantee

[5] The Supreme Court of Appeals did not "refuse" a rehearing. The Senate did not file the petition until after the Court had relinquished jurisdiction of the case. Rule of Appellate Procedure 26 expressly "terminates jurisdiction of the Supreme Court in an action before this Court, unless the Court has provided by order pursuant to Rule 25(a) that a petition for rehearing may be filed after a mandate has issued." W. VA. R. APP. P. 26. No order under Rule 25(a) was issued enlarging the time for filing a Petition for Rehearing. Thus, the Court's jurisdiction terminated when the mandate was issued. Sen. App. 101–102.

Clause in a footnote, this Court should not exert jurisdiction where the Supreme Court of Appeals dealt with wholly state law issues and summarily rejected the Senate's Guarantee Clause argument because the Senate failed to cite "to an opinion by any court in the country that supports the proposition that issuance of a writ against another branch of government violates the Guarantee Clause." Sen. App. 37 n.22. Second, this Court should deny the Senate's invitation to review the justiciability of Guarantee Clause claims because the Supreme Court of Appeals did not rule on the justiciability of those claims. Even if it did, however, the circuit split identified by the Senate does not exist. Third, both Petitioners' questions regarding whether the Guarantee Clause bars judicial review of impeachment proceedings do not merit review because precedent from this Court and courts around the country uniformly recognizes that the Guarantee Clause does not require states to apportion powers in any particular way. Finally, this Court should deny the House of Delegates' Petition because it lacks standing to bring that Petition. The House of Delegates failed to intervene prior to the issuance of the mandate below, and the Supreme Court of Appeals' denial of its late arriving Motion to Intervene rests solely on state law grounds. Accordingly, for the reasons stated below, this Court should deny the Petitions for Writ of Certiorari.

I. THIS COURT LACKS JURISDICTION TO REVIEW THE DECISION BELOW BECAUSE IT WAS DECIDED ON ADEQUATE AND INDEPENDENT STATE LAW GROUNDS.

This Court should decline to the Petitions for Writ of Certiorari because it lacks jurisdiction to review the decision below. 28 U.S.C. § 1257 limits this Court's jurisdiction to

> [f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, . . . where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a).[6] This Court has held that decisions with tangential federal issues that were predominately decided on adequate state law grounds will not be disturbed. *See, e.g.*, *Coleman v. Thompson*, 501 U.S. 722, 729 (1991), *holding modified on other grounds by Martinez v. Ryan*, 566 U.S. 1 (2012) ("This Court will not review a question of federal law decided by a state

[6] In addition to citing 28 U.S.C. § 1257, the House of Delegates' Petition cited to *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663–66 (2015). That case, however, addressed the issue of standing, not jurisdiction. *Id*.

court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment."). This principle is based on the notion that:

> Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground. It is precisely because of this respect for state courts, and this desire to avoid advisory opinions, that we do not wish to continue to decide issues of state law that go beyond the opinion that we review, or to require state courts to reconsider cases to clarify the grounds of their decisions.

Michigan v. Long, 463 U.S. 1032, 1040 (1983).

Here, the decision below was based on independent and adequate state law grounds, and this Court lacks jurisdiction to review it.

A. THE SUPREME COURT OF APPEALS DESCRIBED INDEPENDENT STATE LAW GROUNDS FOR ITS DECISION.

The decision below rests on independent state law grounds. To determine if reliance on state law constitutes independent grounds for a decision, this Court focuses on whether

> in our view, the state court felt compelled by what it understood to be federal constitutional

> considerations to construe its own law in the manner that it did, then we will not treat a normally adequate state ground as independent, and there will be no question about our jurisdiction. Finally, where the non-federal ground is so interwoven with the federal ground as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain.

Michigan v. Long, 463 U.S. 1032, 1038 (1983) (cleaned up). The state law grounds relied upon here were neither compelled by federal constitutional considerations nor interwoven[7] with any federal issue. Indeed, federal law is almost absent from the decision.

For example, the Supreme Court of Appeals' discussion of separation of powers relied almost entirely on state law. *See, e.g.*, Sen. App. 42, *et seq*. The sole federal decision relied upon by the Supreme Court of Appeals was *O'Donoghue v. United States*, 289 U.S. 516 (1933), which was referenced only for its historical discussion of the United States' tripartite system of government. Sen. App. 49–50. Notably, this case was accompanied by a footnote illustrating how the United States Constitution is different from the West Virginia

[7] Treatises note that the "interwoven" element looks to whether the state law decision relies heavily on federal decisions or state law decisions interpreting federal decisions. FEDERAL PROCEDURE, LAWYERS EDITION, INTERWOVEN STATE AND FEDERAL GROUNDS, 2 Fed. Proc., L. Ed. § 3:95. That is not the case here, where the decision below rested on state law and summarily rejected unsupported federal law contentions.

Constitution and has no corollary to Article V, § 1 of the West Virginia Constitution governing the separation of powers. *Id*.

The decision below is best characterized as a state court interpreting the parameters of its state constitution, and it neither relied on nor was mandated by federal law. Instead, it relied on the Supreme Court of Appeals' jurisprudence regarding separation of powers, the West Virginia Constitution, and state statutes. Sen. App. 18–19. It also focused heavily on the fact that the West Virginia Constitution's Impeachment Clause differs substantially from its federal counterpart. Sen. App. 19–20. This Court may exert jurisdiction to review a state court's decision only where the "state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Michigan*, 463 U.S. at 1040–41. That is simply not the case here because "there is [no] strong indication . . . that the federal constitution as judicially construed controlled the decision below." *Id.* at 1040 (citation omitted).

Although the Petitioners focus extensively on the Guarantee Clause, the Supreme Court of Appeals did not substantively address that provision. Instead, it noted that, despite the Senate's contention that the Supreme Court of Appeals' "intervention in [the matter below] would destroy the 'separate and coequal branches' of government" that the Senate asserts is required by the Guarantee Clause, the Senate failed to

cite "to an opinion by any court in the country that supports the proposition that issuance of a writ against another branch of government violates the Guarantee Clause." Sen. App. 37. In essence, the Petitioners ask this Court to exert jurisdiction and review a state court's opinion interpreting state law based on the Supreme Court of Appeals' summary denial of an inadequately supported federal argument.

This Court should decline that invitation. The Petitioners' invocation of the Guarantee Clause is not "interwoven" with the Supreme Court of Appeals' state law determinations; instead, the Supreme Court of Appeals summarily dismissed the sole federal argument asserted by the Senate because it was a threadbare invocation unsupported by precedent. Accordingly, the decision below rested on state law grounds independent of any federal grounds asserted by the Petitioners.

B. THE SUPREME COURT OF APPEALS DESCRIBED ADEQUATE STATE LAW GROUNDS FOR ITS DECISION.

The independent state law grounds were also "adequate." *See, e.g.*, *Volt Info. Sci.'s v. Bd. of Tr.'s*, 489 U.S. 468, 484 n.6 (1989) (Brennan, J., dissenting) (noting varying standards applied by the Court in examining adequacy of state application of state law, and ultimately expressing that "no doubt that the proper standard of review is a narrow one"). Because the Supreme Court of Appeals was not intentionally evading a federal issue, this Court should not substitute its

opinion for the decision below. *See, e.g.*, *Demorest v. City Bank Farmers Trust Co*., 321 U.S. 36, 42 (1944) (noting that "if there is no evasion of the constitutional issue, and the non-federal ground of decision has fair support, this Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule, for that of the state court"). Since "there can be no pretence that the State Court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this Court accepts the decision whether right or wrong." *Wolfe v. North Carolina*, 364 U.S. 177, 195 (1960) (citing *Nickel v. Cole*, 256 U.S. 222, 225 (1921)).

The only federal issue raised by Petitioners, the Guarantee Clause, was not evaded by the court below. As discussed above, the Senate's Guarantee Clause argument was summarily denied based on the Senate's failure to cite relevant precedent. *See* Sen. App. 37 n.22.

The decision rested instead on the West Virginia Constitution's Impeachment Clause, which requires that an impeaching legislature "do justice according to law and evidence." This provision has no analogue in the United States Constitution, and the Supreme Court of Appeals found the West Virginia Constitution offers protection broader than its federal counterpart. As the Senate conceded below, "West Virginia's Impeachment Clause is significantly broader than its counterpart in the United States Constitution." Sen.

App. 31 n.21. This is consistent with a long line of West Virginia cases on a variety of issues holding similarly and establishes that the decision rested on adequate state law grounds. *See, e.g.*, *State ex rel. K.M. v. W. Virginia Dep't of Health & Human Res*., 575 S.E.2d 393, 404 n.15 (W. Va. 2002) ("[I]t is clear that [the West Virginia] Constitution may offer greater protections than its federal counterpart."). Because the decision below rested on independent and adequate provisions of the West Virginia Constitution and West Virginia common law, Petitioners' invocation of the Guarantee Clause does not confer this Court with jurisdiction to review this case.

II. THIS CASE IS A POOR VEHICLE FOR RESOLVING THE JUSTICIABILITY OF GUARANTEE CLAUSE CLAIMS BECAUSE THAT ISSUE WAS NOT DECIDED BY THE COURT BELOW.

Assuming arguendo this Court has jurisdiction to review this case, it should deny the West Virginia Senate's request to grant a writ of certiorari on the issue of "[w]hether Guarantee Clause claims are judicially cognizable" because that issue was not decided by the Supreme Court of Appeals. Although the Senate's Petition for Writ of Certiorari focuses extensively on the history of *New York v. United States*, 505 U.S. 144, 184 (1992), the cases on which *New York* relies, and how this and other courts have historically ruled on the Guarantee Clause, it fails to describe the Supreme Court of Appeals' determination on the justiciability of

Guarantee Clause claims. Instead, the Senate summarily states that the Supreme Court of Appeals determined "that Guarantee Clause claims are never justiciable." Sen. Pet. 23. That characterization, however, misstates the holding of the Supreme Court of Appeals.

Footnote 22 of the Supreme Court of Appeals' opinion contains the entirety of the Guarantee Clause discussion:

> The Respondents have argued that intervention in the impeachment proceeding violates the Guarantee Clause of the federal constitution. This clause provides as follows: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." U.S. Const. Art. IV, § 4. The Respondents contend that the Guarantee Clause requires that a state have "separate and coequal branches" of government. In a convoluted manner the Respondents contend that this Court's intervention in this matter would destroy the "separate and coequal branches" of government. The Respondents have not cited to an opinion by any court in the country that supports the proposition that issuance of a writ against another branch of government violates the Guarantee Clause. *See New York v. United States*, 505 U.S. 144, 184, 112 S.Ct. 2408, 2432, 120 L.Ed.2d 120 (1992) ("In most

> of the cases in which the Court has been asked to apply the [Guarantee] Clause, the Court has found the claims presented to be nonjusticiable under the 'political question' doctrine."). We find no merit in the contention. Further, the issue of the separation of powers doctrine is fully addressed in the Discussion section of this opinion.

Sen. App. 37 n.22. Nowhere in the Supreme Court of Appeals' discussion did it state that Guarantee Clause claims are *per se* nonjusticiable, nor did it indicate when those claims were or were not justiciable. Indeed, the only portion of the footnote discussing justiciability is an isolated parenthetical that directly quotes this Court for the proposition that "most" Guarantee Clause claims are nonjusticiable based on the political question doctrine. Sen. App. 37 (citing *New York v. United States*, 505 U.S. 144, 184 (1992)). Simply put, the Supreme Court of Appeals did not decide or discuss the justiciability of Guarantee Clause claims—and it certainly did not hold, as the Senate claims "that Guarantee Clause claims are never justiciable."[8] Sen. Pet. 23.

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[8] The fact that the Supreme Court of Appeals of West Virginia did not create a syllabus point regarding the justiciability of Guarantee Clause claims further illustrates that it issued no holding regarding the justiciability of those claims. The Supreme Court of Appeals "has consistently held . . . that 'language in a footnote generally should be considered obiter dicta' and that if this Court is to create a new point of law, it will do 'so in a syllabus point and not in a footnote.'" *Parsons v. Halliburton Energy Servs., Inc*, 785 S.E.2d 844, 856 (W. Va. 2016) (quoting *Valentine v. Sugar Rock, Inc.*, 766 S.E.2d 785, 791 (W. Va. 2014)).

Instead, the natural reading of the opinion below is that the Supreme Court of Appeals recognized that the Senate contended that court intervention in the impeachment process violated the Guarantee Clause, determined that the Senate provided no authority in support of that contention, and summarily denied the Guarantee Clause argument because it was inadequately supported. Regardless of the precise meaning of the footnote, it is evident that the Supreme Court of Appeals did not opine on the justiciability of Guarantee Clause claims. This Court has made clear, however, that it reviews well-developed cases—not cases where the issues presented have not been squarely addressed below. *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999) ("[W]e do not decide in the first instance issues not decided below."); *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 538 (1992) ("Prudence also dictates awaiting a case in which the issue was fully litigated below, so that we will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question."); *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 552 n.3 (1990) ("Applying our analysis . . . to the facts of a particular case without the benefit of a full record or lower court determinations is not a sensible exercise of this Court's discretion."). This case lacks that necessary development and does not provide this Court the opportunity to reach the broad question posed by the Senate. It therefore does not merit certiorari review.

III. THE ASSERTED CIRCUIT SPLIT REGARDING THE JUSTICIABILITY OF GUARANTEE CLAUSE CLAIMS AMOUNTS TO LITTLE MORE THAN VARYING DEGREES OF "IT DEPENDS."

Even assuming that the Supreme Court of Appeals reached the issue of the justiciability of Guarantee Clause claims, the circuits are not split on that issue. Although the circuits acknowledge, as this Court has acknowledged, that Guarantee Clause claims are infrequently justiciable and often present political questions, the circuits widely recognize "that perhaps not all claims under the guaranty clause present nonjusticiable political questions." *Texas v. United States*, 106 F.3d 661, 666 (5th Cir. 1997) (determining that a Guarantee Clause claim was nonjusticiable after determining that the plaintiff suggested "no manageable standards" as required by the political question analysis). The Senate's asserted circuit split therefore does not exist.

The Senate overstates the status of the law in several circuits when it makes the sweeping determination that "four federal courts of appeals have held . . . that Guarantee Clause claims are never justiciable." Sen. Pet. 23. Instead, those circuits recognize—like the other side of the Senate's purported split—that Guarantee Clause claims occasionally present justiciable questions.

For example, the Senate asserts that *O'Hair v. White*, 675 F.2d 680, 684 (5th Cir. 1982), establishes

Guarantee Clause claims as *per se* nonjusticiable in the Fifth Circuit. However, the Fifth Circuit in *Texas*, 106 F.3d at 666, recognized that "perhaps not all claims under the guaranty clause present nonjusticiable political questions" based on this Court's decision in *New York v. United States*, 505 U.S. 144 (1992)—a decision this Court rendered after the Fifth Circuit decided *O'Hair*. Based on its determination that the justiciability of Guarantee Clause claims was not entirely barred, the Fifth Circuit used the "manageable standards" test announced in *Baker v. Carr*, 369 U.S. 186, 217 (1962), to determine that the particular Guarantee Clause claim presented in that case, a challenge asserted by the state of Texas against the federal government for costs associated with undocumented aliens, was a nonjusticiable political question. *Texas*, 106 F.3d at 667. The Fifth Circuit, therefore, does not totally foreclose the justiciability of Guarantee Clause claims; instead, it uses the political question test to determine the justiciability of those claims.

Similarly, while the Sixth Circuit recently noted that "[t]raditionally, the Supreme Court 'has held that claims brought under the Guarantee Clause are nonjusticiable political questions,'" it explicitly recognized that this Court "has expressed doubt that all Guarantee Clause challenges are not justiciable." *Phillips v. Snyder*, 836 F.3d 707, 717 (6th Cir. 2016). It then proceeded to analyze whether a Michigan statute violated the Guarantee Clause where it allowed appointed emergency managers to exercise the duties of certain elected officials whenever school districts face financial

distress. It determined that, assuming the Guarantee Clause claim presented was justiciable, the challenge to the state's apportionment of powers among its political bodies did not violate the Guarantee Clause because it was

> aware of no case invalidating the structure of political subdivisions of states under the Clause. This is not surprising in light of the Supreme Court's repeated indication that states, not federal courts, should determine the structure of political subdivisions within a state. The Court has recognized that "[h]ow power shall be distributed by a state among its governmental organs, is commonly, if not always, a question for the state itself."

Id. at 717 (citing *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937)). Therefore, although the Sixth Circuit ultimately determined the particular Guarantee Clause claim presented in *Phillips* was a nonjusticiable political question, it did not totally foreclose review of Guarantee Clause claims. Indeed, the Sixth Circuit undertook a review of the "*validity* of a Guarantee Clause challenge to the form of government of a political subdivision of a state" precisely because it acknowledged that the claim *could* be justiciable. *Id.* at 718 (emphasis added). The Sixth Circuit, therefore, does not totally foreclose judicial review of Guarantee Clause claims.

The Senate also relies on *Risser v. Thompson*, 930 F.2d 549 (7th Cir. 1991), for the proposition that the Seventh Circuit will never review Guarantee Clause

claims. Although Judge Posner stated that "[t]he clause guaranteeing to each state a republican form of government has been held not to be justiciable," *Risser*, 930 F.2d at 552, that statement was issued prior to this Court's recognition in *New York* that "the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions." *New York*, 505 U.S. at 185. Seventh Circuit cases implicating the Guarantee Clause rendered since *New York* have reached the merits of Guarantee Clause claims, expressing doubt that Guarantee Clause claims are nonjusticiable. *See Bowman v. Indianapolis*, 133 F.3d 513, 518 (7th Cir. 1998) (upholding a district court ruling in *Bowman v. Indianapolis*, 927 F. Supp. 309, 312 (S.D. Ind. 1996), *rev'd*, 133 F.3d 513 (7th Cir. 1998) that decided the merits of a plaintiff's Guarantee Clause claim); *Mueller v. Reich*, 54 F.3d 438, 443 (7th Cir. 1995), *overturned on other grounds by Wisconsin v. Mueller*, 519 U.S. 1144 (1997) ("Since we do not think the Department of Labor's rule inimical to the guarantee clause, we need not speculate on whether the Supreme Court continues to believe that the clause does not create any legally enforceable rights."). In light of this Court's decision in *New York*, the Seventh Circuit has trended away from its holding in *Risser*, and it no longer totally forecloses judicial review of Guarantee Clause claims.

Finally, the Senate argues that two Ninth Circuit cases establish that Guarantee Clause claims are never justiciable under that circuit's precedent. First, it argues that *California v. United States*, 104 F.3d

1086, 1091 (9th Cir. 1997), forecloses judicial review of Guarantee Clause claims because the court in that case stated, "Supreme Court decisions have traditionally found that claims brought under the Guarantee Clause are nonjusticiable." *Id.* (citing *New York*, 505 U.S. at 183–85). The Ninth Circuit expressly noted, however, that this Court's jurisprudence trended toward determining the justiciability of Guarantee Clause claims based on "the 'political question' doctrine"—not on any blanket bar of the justiciability of Guarantee Clause claims. *Id.* at 1091 n.7. In determining that "California's claims under the Guarantee Clause . . . raise nonjusticiable political questions," *id.*, the Ninth Circuit expressly relied on a number of opinions that determined similar cases involving allegations that the federal government's failure to halt illegal immigration violated the Guarantee Clause presented nonjusticiable political questions because resolution of those issues "would require a court to evaluate the formulation and implementation of immigration policy by the executive branch . . . [and s]uch issues fall squarely within a substantive area clearly committed by the Constitution to the political branches." *New Jersey v. United States*, 91 F.3d 463, 470 (3d Cir. 1996); *see also Chiles v. United States*, 69 F.3d 1094, 1097 (11th Cir. 1995) (upholding the district court's determination in *Chiles v. United States*, 874 F. Supp. 1334, 1344 (S.D. Fla. 1994) that the immigration issue presented was a nonjusticiable political question because "[t]he Plaintiffs fail to suggest, and the Court is unable to identify, a manageable standard for determining when the migration, as well as the costs associated with such

migration, reaches the point at which it invades the State of Florida's state sovereignty"—not because of a total bar to the justiciability of Guarantee Clause claims). Accordingly, the Ninth Circuit's opinion in *California* does not amount to a total bar on the justiciability of Guarantee Clause claims; instead, it stands for the proposition that courts in the Ninth Circuit must apply the political question test to determine whether a particular Guarantee Clause claim is justiciable.

The Senate asserts that the Ninth Circuit summarily and definitively rejected the justiciability of Guarantee Clause claims in *Murtishaw v. Woodford*, 255 F.3d 926, 961 (9th Cir. 2001). Although the court in *Murtishaw* determined that "[a] challenge based on the Guarantee Clause, however, is a nonjusticiable political question," it made that determination in a case involving a Guarantee Clause challenge to a voter-driven amendment to the California Constitution and specifically cited to *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 146 (1912). That citation is significant. The Court in *Pacific States* determined that a similar voter-driven amendment presented a nonjusticiable political question. The more sensible reading of *Murtishaw*, therefore, is not a sweeping bar on the justiciability of Guarantee Clause claims, but a reading that bars review of the particular voter-driven amendment practices this Court previously determined were nonjusticiable in *Pacific States* and is limited to the facts of that particular case. Accordingly, the Ninth

Circuit does not totally bar judicial review of Guarantee Clause claims.

Functionally, the law from the circuits that the Senate contends never permit judicial review of Guarantee Clause claims is the same as the law from the Second, Fourth, and Tenth Circuits, the circuits which the Senate contends have established "no absolute bar to considering Guarantee Clause claims." Sen. Pet. 25. Although the cases the Senate cites from the Second, Fourth, and Tenth Circuit more strongly state that Guarantee Clause claims are occasionally justiciable, the Fifth, Sixth, Seventh, and Ninth Circuits have also recognized that Guarantee Clause claims may present justiciable questions. The sole difference between the two sides of the purported split identified by the Senate is that the Second, Fourth, and Tenth Circuits have issued a more resounding "it depends." That, however, does not amount to a circuit split. Accordingly, this issue does not merit certiorari review.

IV. THE SEPARATION OF POWERS ISSUES DECIDED BY THE SUPREME COURT OF APPEALS DO NOT WARRANT REVIEW BECAUSE THEY ARE ISSUES FOR THE STATE TO RESOLVE.

In addition to asking this Court to resolve a question regarding the justiciability of the Guarantee Clause, Petitioners ask this Court to review the Supreme Court of Appeals' decision to determine whether its interpretation of the West Virginia Constitution and the

apportionment of powers under that Constitution runs afoul of the Guarantee Clause. Sen. Pet. i (asking this Court to consider "[w]hether a state judiciary's intrusion into the impeachment process represents so grave a violation of the doctrine of separation of powers as to undermine the essential components of a republican form of government"); House Pet. i (asking this Court to consider "[w]hether the Supreme Court of Appeals' decision in this case violates the Guarantee Clause of the United States Constitution"). In essence, Petitioners use the Guarantee Clause as a proverbial Trojan Horse, asking this Court to resolve state separation of powers issues by couching them in federal terms. The particular apportionment of power among the branches of West Virginia's government is, however, a question that should be resolved at the state level, and does not merit review. *See, e.g.*, *Highland Farms Dairy*, 300 U.S. at 612 ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."); *cf. Whalen v. United States*, 445 U.S. 684, 689 (1980) ("The Court has held that the doctrine of separation of powers embodied in the Federal Constitution is not mandatory on the States."); *Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local 309 v. Hanke*, 339 U.S. 470, 479 (1950) ("The Fourteenth Amendment leaves the States free to distribute the powers of government as they will between their legislative and judicial branches.").

Petitioners take turns painting the decision below in alarmist language, suggesting that decision

represents "a significant breakdown of the separation of powers [sufficient to] rend the republican fabric of a State's political regime" and an "eviscerat[ion of] an important check in a government's system of checks and balances by usurping authority committed to a coordinate branch of government, [rendering] a republican form government . . . no longer extant." Sen. Pet. 29–30; House Pet. 11. This is an overstatement of the decision below. The decision did not "insulate[] the judiciary—in this and future cases—from the essential check that impeachment provides in a republican government." Sen. Pet. 3. Instead, the Supreme Court of Appeals found that the West Virginia judicial branch was empowered by the state constitution's Impeachment Clause, which it determined provides more protection than the federal Impeachment Clause, to review the constitutionality of impeachment proceedings. *See, e.g.*, Sen. App. 17–22. It also determined the legislative branch may not usurp powers specifically apportioned to the judicial branch by the West Virginia Constitution. *See, e.g.*, *id.* at 52–74. Finally, it held that the legislature must provide citizens a modicum of procedural due process when it undertakes impeachment efforts. *See, e.g.*, *id.* at 83–90.

In a decision limited to the very particular set of facts before it, the Supreme Court of Appeals halted the impeachment on three very narrow grounds. First, it held that the legislature may not seek to limit the judiciary's constitutionally-prescribed power to pay senior status judges to maintain an efficient, functioning judiciary because "[l]egislative enactments which

are not compatible with those prescribed by the judiciary or with its goals are unconstitutional violations of the separation of powers" under West Virginia law. *State ex rel. Quelch v. Daugherty*, 306 S.E.2d 233, 235 (W. Va. 1983); Sen. App. 52–74. Therefore, when the legislature passes a statute that infringes on the powers apportioned to the judicial branch by the West Virginia Constitution, that statute is unconstitutional and may not be used as a basis for impeachment of judicial officers.

Next, the Supreme Court of Appeals determined that the legislature lacked the power to determine whether Respondent violated the Canons of Judicial Conduct. Sen. App. 74–82. The judicial branch of West Virginia—not the legislative branch—is tasked with interpreting the Canons of Judicial Conduct, and when the legislature sought to adjudicate whether justices violated those provisions in the course of impeachment proceedings, the Supreme Court of Appeals determined that the legislature usurped powers apportioned to the judicial branch by the West Virginia Constitution. *Id.* The Senate grossly overstates this holding, contending that the Supreme Court of Appeals determined that the "legislature can *never* use conduct regulated by West Virginia's Code of Judicial Conduct as grounds for impeachment." Sen. Pet. 4. The Supreme Court of Appeals did not hold that conduct that might run afoul of the Canons of Judicial Conduct could not serve as a basis for impeachment; instead, it determined that the legislature's Articles of Impeachment were invalid because they called upon the

legislature "to make a determination that the Petitioner violated Canon I and Canon II." Sen. App. 80. This is a narrow holding simply requiring that the legislature not invoke the Canons of Judicial Conduct in the impeachment context. The legislature remains free to base its actions on otherwise impeachable conduct so long as its articles of impeachment do not necessarily entail an adjudication of the Canons of Judicial Conduct.

Finally, the Supreme Court of Appeals took the unremarkable position that, even in the context of impeachment, individuals retain their right to Due Process under the West Virginia Constitution. Sen. App. 83–90. When the House of Delegates passed House Resolution 201, it stated that it would "make findings of fact" in addition to its Articles of Impeachment. *See* Sen. App. 86–89. The House failed to do so, and the Court found that its failure to follow specific procedures that it created violated Respondent's right to Due Process under the West Virginia Constitution. Notably, it did not find the House's impeachment procedures themselves violative—it found the failure to follow those procedures amounted to a Due Process violation. Sen. App. 89.

Although its decision was made in the extraordinary context of impeachment proceedings, the decision of the Supreme Court of Appeals is an ordinary judicial function. Courts are charged with interpreting constitutions and determining the proper separation of powers under those constitutions. *See, e.g.*, *Baker*, 369 U.S. at 211 ("Deciding whether a matter has in any

measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."). That is what the Supreme Court of Appeals did below when it determined the meaning of the West Virginia Constitution's Impeachment Clause and the apportionment of powers under the West Virginia Constitution.

Despite this, both Petitioners argue that the Supreme Court of Appeals' decision amounts to the dissolution of a republican form of government, and the Senate states that the Supreme Court of Appeals' determinations about the apportionment of powers under the West Virginia Constitution amounts to a "breakdown of the separation of powers" that warrants this Court's review. Sen. Pet. 29. However, the Senate fails to identify opinions from either federal or state courts that indicate judicial review of impeachment proceedings, as permitted by a state constitution, violates the Guarantee Clause. Much like the proceedings below, where the Supreme Court of Appeals specifically noted that the Senate did "not cite[] to an opinion by any court in the country that supports" its Guarantee Clause claims, the Senate again fails to proffer any authority showing that judicial review of impeachment proceedings violates the Guarantee Clause or that courts are split on that particular issue. Sen. App. 37 n.22. Instead, the Senate identifies state court decisions from Kansas and Colorado that it asserts come

to different decisions regarding whether separation of powers is required by the Guarantee Clause. The question presented by the Senate, however, is not whether separation of powers is required by the Guarantee Clause; rather, the Senate asks this Court to resolve whether a particular apportionment of powers by a state violates the Guarantee Clause. Specifically, it asks whether judicial review of impeachment proceedings so deeply undermines the separation of powers that it violates the Guarantee Clause. Both cases relied upon by the Senate and this Court's precedent plainly show that there is no split of authority on that issue which merits certiorari review.

In *VanSickle v. Shanahan*, 511 P.2d 223, 243 (Kan. 1973), the Supreme Court of Kansas considered whether a constitutional amendment placing certain powers traditionally held by the legislative branch into the executive branch amounted to a violation of the Guarantee Clause. Although the Court determined the "doctrine of separation of powers is an inherent and integral element of the republican form of government, and separation of powers, as an element of the republican form of government," *id.* at 427, it held that vesting the executive branch with certain powers traditionally reserved for the legislative branch did not violate the Guarantee Clause because "[t]he Kansas government is still divided into the legislative, executive and judicial departments, the duties of which are discharged by representatives selected by the people at free elections held on regularly recurring election days." *Id.* at 451. Moreover, the specific apportionment

of power by Kansas was not subject to federal regulation because "[h]ow power shall be distributed by a state Constitution among its governmental departments is commonly, if not always, a question for the state itself." *Id.* at 450 (citing *Highland Farms Dairy*, 300 U.S. at 612).

Similarly, in *In re Interrogatories Propounded by Senate Concerning House Bill 1078*, 536 P.2d 308, 316 (Colo. 1975), the Supreme Court of Colorado specifically noted that "[r]elevant United States Supreme Court cases indicate that the Guaranty Clause does not require a particular distribution of power within a state." *Id.* It drew that determination from the clear proclamation of this Court:

> Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State.

Dreyer v. Illinois, 187 U.S. 71, 84 (1902).

Indeed, in *Baker v. Carr*, 369 U.S. 186, 226–27 (1962), the case that the Senate contends "changed the game" of Guarantee Clause jurisprudence, this Court implicitly recognized that Guarantee Clause claims challenging how a state apportions its powers are doomed to failure. Specifically, this Court noted, after analyzing a variety of cases considering Guarantee

Clause challenges to state governmental action, "This case does, in one sense, involve the allocation of political power within a State, and the appellants might conceivably have added a claim under the Guaranty Clause. Of course, as we have seen*, any reliance on that clause would be futile*." *Baker*, 369 U.S. at 226–27 (emphasis added). That statement is not aberrant—this Court has long held that states are free to apportion powers among their political branches as they desire. *See, e.g.*, *Mayor of City of Philadelphia v. Educ. Equal. League*, 415 U.S. 605 (1974) ("This is not to say, of course, that the State of Pennsylvania may not pattern its government after the scheme set forth in the Federal Constitution or in any other way it sees fit. The Constitution does not impose on the States any particular plan for the distribution of governmental powers."); *Sweezy v. New Hampshire by Wyman*, 354 U.S. 234, 255 (1957) ("Moreover, this Court has held that the concept of separation of powers embodied in the United States Constitution is not mandatory in state governments."). Simply put, *Baker*, like the other cases relied upon by the Senate, recognizes that the Guarantee Clause does not mandate any particular apportionment of powers within a state.

The cases relied upon by the Senate in its Petition and this Court's precedent make clear that states are free to apportion powers differently than the federal government. This Court—and the state courts relied upon by the Senate—repeatedly recognize that states do not run afoul of the Guarantee Clause merely by apportioning powers differently than the federal

government. Accordingly, this case does not merit certiorari review.

V. THE HOUSE OF DELEGATES LACKS STANDING AND PRESENTS NO REASON FOR THE COURT TO GRANT CERTIORARI.

The House of Delegates lacks standing to petition this Court for certiorari because the House was not a party to the proceedings below. Respondent's Petition only named the Senate and individual members of that legislative body. While the Supreme Court of Appeals was considering the Petition, the House made no attempt to intervene. Notably, the House waited until after the Supreme Court of Appeals decided the case and relinquished jurisdiction by mandate before attempting to intervene. In its Motion to Intervene, the House admitted that it "was not a party to the Workman litigation prior to the issuance of the decision." House App. 232a. Further, the House premised the timeliness of its Motion to Intervene upon its incorrect belief that "no mandate ha[d] issued from the Court." *Id*. However, the mandate was issued, relinquishing jurisdiction of the matter, two weeks prior. House App. 95a.

The House does not assert the return of its Motion to Intervene was unconstitutional or violated any federal law, but instead argues that the Supreme Court of Appeals "violated its own precedent" and "violated its own rules." House Pet. 27–32. The House's arguments are unavailing, and this Court lacks jurisdiction to

decide that quintessentially state issue. *See* 28 U.S.C. § 1257; *supra* pgs. 9–15.

The House relies on *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, 510 U.S. 27 (1993), to establish that this Court should accept appeals from non-parties who failed to intervene below. However, that case is inapposite. In *Izumi*, this Court stated that "[o]ne who has been *denied* the right to intervene in a case in a *court of appeals* may petition for certiorari to review that ruling." *Izumi*, 510 U.S. at 30 (emphasis added). There, the denial of a motion to intervene was premised on a *Federal Rule of Civil Procedure*, and the intervening parties moved before the Court lost jurisdiction. *Id*. Further, the nonparty petitioner was a party to the initial trial that eventually resulted in the appeal to this Court. *Id.* at 28–29. When a secondary trial resulted in a settlement between two other parties that required they request vacatur of the District Court's decision in the initial trial, Izumi moved to intervene in the Court of Appeals to oppose vacatur, but the motion was denied. *Id.* at 29.

Here, unlike in *Izumi*, the House was never a party to the case before the court below, the House never attempted to intervene while the case was ongoing, and the House's Motion was never denied. Instead, while the actual parties briefed the case and the Supreme Court of Appeals considered the Respondent's writ, the House sat silent. Respondent's Petition was pending before the Supreme Court of Appeals for three weeks, and the House never moved to intervene in that time. After the Supreme Court of Appeals issued an

opinion with which the House disagreed, the House waited two more weeks before moving to intervene. Because of its delay, the House did not move to intervene until after the court below lost jurisdiction under state procedural rules. Importantly, the House asks this Court to review the lower court's denial of its Motion to Intervene based on state rules, not the Federal Rules of Civil Procedure. This Court has no jurisdiction to review the Supreme Court of Appeals' interpretation of the West Virginia Rules of Appellate Procedure. Therefore, this Court should deny the House's Petition for Writ of Certiorari.

Even if this Court decides that the House has standing, the House's Petition for Writ of Certiorari identifies no reason to grant review. The only split of authority identified by the House involves two different state courts of last resort (West Virginia and Arizona) interpreting the impeachment clauses of two different state constitutions. *See, e.g.*, House Pet. 24–25. This is not an adequate basis for this Court to review the decision below, and the House's Petition is devoid of other reasons distinct from the Senate's Petition for this Court to grant review. Therefore, the House of Delegates' Petition should be denied.

CONCLUSION

For the reasons stated above, the Court should deny the Petitions filed by both the West Virginia House of Delegates and the West Virginia Senate.

Respectfully submitted,

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